Supreme Court, U.S.
FILED

No. 94-1525 MAR 15 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

RICHARD L. BARNYAK,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

OF COUNSEL:
MARK S. GREENBERG
3100 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
(215) 735-5900

ANNE M. DIXON
3100 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
(215) 735-5900
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTION PRESENTED FOR REVIEW

SHOULD THIS COURT ADDRESS THE ISSUE LEFT OPEN IN *WHITE v. ILLINOIS*, 112 S.Ct. 736 (1992) OF WHETHER A HEARSAY STATEMENT IMPROPERLY ADMITTED UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE REGARDLESS OF THE DECLARANT'S AVAILABILITY AT TRIAL?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES* ii

INDEX TO APPENDIX iii

TABLE OF CITATIONS iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 7

THE DECISION BELOW INVOLVES THE ISSUE LEFT OPEN IN *WHITE v. ILLINOIS*, 112 S.Ct. 736 (1992): WHETHER A HEARSAY STATEMENT IMPROPERLY ADMITTED UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE REGARDLESS OF THE DECLARANT'S AVAILABILITY AT TRIAL. ACCORDINGLY, THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE ISSUE.

CONCLUSION 12

***LIST OF ALL PARTIES**

THE CAPTION OF THE CASE IN THIS COURT CONTAINS THE NAMES OF ALL PARTIES (RICHARD L. BARNYAK AND THE COMMONWEALTH OF PENNSYLVANIA).

INDEX TO APPENDIX

OPINION OF PENNSYLVANIA SUPERIOR COURT DATED JANUARY 25, 1994 AFFIRMING THE JUDGMENT OF SENTENCE.....A

ORDER OF PENNSYLVANIA SUPREME COURT DENYING ALLOWANCE OF APPEAL.....B

OPINION OF PENNSYLVANIA SUPERIOR COURT DATED SEPTEMBER 7, 1993 REVERSING THE JUDGMENT OF SENTENCE AND REMANDING TO COURT OF COMMON PLEAS FOR A NEW TRIAL.....C

ORDER OF COURT OF COMMON PLEAS DATED MARCH 11, 1991 DENYING MOTION IN LIMINE TO EXCLUDE STATEMENTS MADE TO TROOPER PAUL YUHOUSE AT HOSPITAL BY KATHY DIXON AND DOUGLAS BUMBARGER.....D

OPINION OF COURT OF COMMON PLEAS DATED SEPTEMBER 14, 1992.....E

TABLE OF CITATIONS

Page

CASES

California v. Green, 399 U.S. 149 (1970) 2, 7

Chambers v. Mississippi, 410 U.S. 284 (1973).....7, 8

Commonwealth v. Hess, 270 Pa. Super. Ct. 501, 411 A.2d 830 (1980) 9

Delaney v. United States, 263 U.S. 586 (1924)..... 7

Dutton v. Evans, 400 U.S. 74 (1970)..... 2

Evans v. Court of Common Pleas, Delaware County, 959 F.2d 1227 (3d Cir. 1992) 2

Idaho v. Wright, 497 U.S. 805 (1990) 8

Lee v. Illinois, 476 U.S. 530 (1986) 8

Maryland v. Craig, 497 U.S. 836 (1990)..... 7

Pointer v. Texas, 380 U.S. 400 (1965) 7, 8

White v. Illinois, 112 S.Ct. 736 (1992) 8, 9

RULES

Fed. R. Evid. §803(2) 9

TREATISES

5 Wigmore, *Evidence* §1367 at 32 (Chadbourne rev. 1974)..... 7

Strong, J., *McCormick on Evidence* §272 at 216 (4th ed. 1992)..... 9

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner Richard L. Barnyak respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in the above-entitled proceeding on January 25, 1994 in which the Supreme Court of Pennsylvania denied Allowance of Appeal on December 19, 1994.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court denying Petitioner's Allowance of Appeal (Appx. B) is reported at ___ A.2d ___, No. 181 M.D. 1994 (Pa. S. Ct. Dec. 19, 1994). The opinion of the Pennsylvania Superior Court dated January 25, 1994 (Appx. A) affirming the judgment of sentence, which is the subject of this Petition, is reported at 432 Pa. Super. 483, 639 A.2d 40 (1994). The opinion of the Pennsylvania Superior Court dated September 7, 1993 (Appx. C) reversing the judgment of sentence and remanding for a new trial is unreported. The opinion of the Court of Common Pleas of Centre County, Pennsylvania dated September 14, 1992 (Appx. D) is not officially reported.

JURISDICTION

The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal in this case on December 19, 1994 (Appx. B). Petitioner's conviction had been affirmed by the Superior Court of Pennsylvania, an intermediate

appellate court, on January 25, 1994 (Appx. A). Petitioner noted for the Superior Court that hearsay testimony violated the right of a defendant to confront his accusers.[1] The jurisdiction of this Court to review the decision of the Pennsylvania Supreme Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . . "

STATEMENT OF THE CASE

Petitioner Richard L. Barnyak was charged in an information filed by the District Attorney of Centre County, Pennsylvania, with attempted murder, first and

[1] Petitioner argued in the trial court that the introduction of the out-of-court statements of Douglas Bumbarger and Kathy Dixon violated the hearsay rule. This Court has recognized that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California v. Green*, 399 U.S. 149, 155 (1970), and "stem from the same roots." *Dutton v. Evans*, 400 U.S. 74, 86 (1970). *Cf. Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227 (3d Cir. 1992) (not necessary to invoke "talismanic phrases" to obtain federal review).

third degree,[2] aggravated assault,[3] simple assault,[4] recklessly endangering another person,[5] and terroristic threats.[6] The District Attorney accused Petitioner of shooting Kathy Marie Dixon in the hand at approximately 2:00 a.m. on April 21, 1990 while inside a trailer home they shared. The case was captioned as *Commonwealth of Pennsylvania v. Richard L. Barnyak,* Criminal Action No. 1990-94 (Centre County).

Trial began on March 11, 1991 before the Honorable Charles C. Brown, Jr., President Judge of the Court of Common Pleas of Centre County, Pennsylvania and a jury. On March 12, 1991, the jury returned a verdict of not guilty on the counts charging Petitioner with attempted murder in the first and third degree and guilty on the other counts of the information. Petitioner was sentenced on September 28, 1992 on the aggravated assault count to a mandatory minimum sentence of five to ten years incarceration.[7] Sentences on the other counts were ordered to run concurrently with the aggravated assault count or were found to have merged for purposes of sentencing with the aggravated assault count.

---

[2] 18 Pa. C.S.A. §901 (Purdon 1983). The murder statute in Pennsylvania is found at 18 Pa. C.S.A. §2502 (Purdon 1983).

[3] 18 Pa. C.S.A. §2702 (Purdon Supp. 1994)

[4] 18 Pa. C.S.A. §2701 (Purdon 1983)

[5] 18 Pa. C.S.A. §2705 (Purdon 1983)

[6] 18 Pa. C.S.A. §2706 (Purdon 1983)

[7] 42 Pa. C.S.A. §9712(a) (Purdon 1983)

Petitioner did not dispute that he fired the gun that resulted in Ms. Dixon getting shot in the hand but testified that he did not *intentionally* shoot Ms. Dixon.[8] The trial court instructed the jury that before it could find Petitioner guilty of any of the counts charging him with aggravated assault or one of the two counts charging him with simple assault,[9] it had to find that Petitioner acted "intentional[ly]," and "that it was his conscious object or purpose to cause such serious bodily injury . . . [or] bodily injury." *R.* 499(a)-504(a). Thus, the issue joined at trial was whether Petitioner intentionally shot Ms. Dixon.

The Commonwealth, in an effort to prove that Petitioner intentionally shot Ms. Dixon, elicited testimony from Pennsylvania State Trooper Paul A. Yuhouse concerning hearsay statements made to him by Ms. Dixon and her son Douglas Bumbarger at approximately 3:10 a.m. on April 21, 1990, over one hour after the shooting, at the hospital where Ms. Dixon was treated for her hand injury.[10] Trooper Yuhouse, over objection, testified that Ms. Dixon told him that she and Petitioner were arguing

---

[8] Petitioner's testimony denying he intentionally shot Ms. Dixon was consistent with a statement he gave to Trooper Robert Snook, a witness called by the Commonwealth, who testified that he took a statement from Petitioner wherein Petitioner stated that he believed Ms. Dixon had left the trailer prior to shooting the gun. *R.* at 195(a)-196(a). References to "*R.*" are to pages in the reproduced record filed in the Superior Court of Pennsylvania.

[9] Count seven of the Information charged Petitioner with negligently causing bodily injury with a deadly weapon.

[10] Both Kathy Dixon, who married Petitioner prior to trial, and Douglas Bumbarger refused to testify at trial.

earlier in the evening and that Petitioner fired two to four shots, one of which struck her in the hand. *R.* at 142(a)-143(a).

Trooper Yuhouse also testified, over objection, to the following hearsay statements made by Ms. Dixon's son, Douglas Bumbarger: (1) that before the shooting, Petitioner and Ms. Dixon were verbally and physically arguing; (2) that Petitioner called Mr. Bumbarger a "fucking bastard"; (3) that Petitioner said "I'm going to kill you all"; (4) that Petitioner fired three or four shots up the bedroom door; and (5) that after the shooting was over, Petitioner came out of the bedroom with a gun in his hand and a smile on his face and ordered both Ms. Dixon and Mr. Bumbarger to leave the trailer. *R.* at 143(a)-145(a). Mr. Bumbarger's hearsay was particularly damaging given his attribution to Petitioner the statement "I am going to kill you all" which directly related to Petitioner's intent when he fired the gun.

Petitioner objected to this hearsay pretrial, during trial and on appeal. (Appx. A; C; D; E). On September 7, 1993, the Superior Court of Pennsylvania reversed the judgment of sentence and ordered a new trial on the ground that, contrary to the ruling of the trial court, the hearsay statements of Ms. Dixon and Mr. Bumbarger did not qualify under the excited utterance exception to the hearsay rule. (Appx. C). *Commonwealth of Pennsylvania v. Richard L. Barnyak,* No. 671 Harrisburg 1992.

On January 25, 1994, the superior court, in response to the "Commonwealth's Application for Reargument En Banc," withdrew its initial opinion reversing the judgment of sentence and ruled that, indeed, the hearsay

statements of Ms. Dixon and Mr. Bumbarger had been properly admitted under the excited utterance exception to the hearsay rule. (Appx. A).

With respect to the hearsay statements Trooper Yuhouse attributed to Ms. Dixon, the Superior Court cited testimony of hospital personnel and Trooper Yuhouse that Ms. Dixon was pale, frightened and upset *at the time* she allegedly made the above-referenced hearsay statements to the Trooper. (Appx. A4-7).

As for the hearsay statements Trooper Yuhouse attributed to Mr. Bumbarger, who was interviewed after his mother, there was no evidence presented concerning Mr. Bumbarger's physical condition or state of mind *at the time* he uttered the hearsay statements attributed to him by Trooper Yuhouse. The superior court ruled, nonetheless "[c]onsidering the involvement of Ms. Dixon and her son in the shooting incident, and considering the mother/son relationship between the two, we have no difficulty finding that their statements at the hospital were declarations made while experiencing overpowering emotion caused by a shocking event." (Appx. A6).

On April 27, 1994, Petitioner filed a "Petition for Allowance of Appeal From the Superior to the Supreme Court" of Pennsylvania arguing, *inter alia*, that the Superior Court of Pennsylvania had erred in concluding that the statements of Ms. Dixon and Mr. Bumbarger were admissible under the excited utterance exception to the hearsay rule. The Supreme Court of Pennsylvania denied this Petition for Allowance of Appeal on December 19, 1994. (Appx. B).

REASONS FOR GRANTING THE WRIT

It has long been held that the admission of hearsay may constitute a violation of the Confrontation Clause of the Sixth Amendment. *Delaney v. United States,* 263 U.S. 586 (1924). The exclusion of hearsay is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. *Chambers v. Mississippi,* 410 U.S. 284 (1973).

> Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Id. at 298 *citing California v. Green,* 399 U.S. 149 (1970).

A state criminal defendant's right to confrontation is guaranteed under the Fourteenth Amendment of the United States Constitution. *Pointer v. Texas,* 380 U.S. 400 (1965). The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to the rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig,* 497 U.S. 836 (1990). The chief mechanism of ensuring the reliability of evidence is cross-examination which has been described "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, *Evidence* §1367 at 32 (Chadbourne rev. 1974).

The right to confrontation and cross-examination contributes to a system of criminal justice in which the perception as well as the reality of fairness prevails. *Lee v. Illinois,* 476 U.S. 530 (1986). The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him because experience shows that it can expose falsehoods and bring out the truth. *Pointer v. Texas,* 380 U.S. 400 (1965). Indeed, because cross-examination is an essential and fundamental requirement for a fair trial, its deprivation to an accused may constitute a violation of due process within the meaning of the Fourteenth Amendment. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Pointer v. Texas,* 380 U.S. 400 (1965).

To be sure, not all hearsay violates an accused's right to confrontation. Hearsay falling within a traditional or "firmly rooted" exception is admissible under the Confrontation Clause regardless of the declarant's availability at trial. *White v. Illinois,* 112 S.Ct. 736 (1992). In those situations where the hearsay sought to be admitted does not fall within a "firmly rooted" exception, the hearsay will be excluded unless, under the totality of the circumstances, there has been a finding of "particularized guarantees of trustworthiness." *Idaho v. Wright,* 497 U.S. 805 (1990). The Court in *White v. Illinois,* 112 S.Ct. 736 (1992) held, in part, that a "spontaneous declaration" is a "firmly rooted" exception to the hearsay rule and is admissible regardless of the declarant's availability at

trial.[11] This ruling was premised explicitly upon the finding that the statements in question fell within a "firmly rooted" exception to the hearsay rule. *Id.* at 740 n. 4. Petitioner submits that the question left open in *White* is whether the Confrontation Clause would be violated by the improper admission of hearsay under the spontaneous declaration or excited utterance exception to the hearsay rule regardless of the declarant's availability at trial. This Court should address this issue and hold that Petitioner's right of confrontation was violated by the admission of the hearsay statements of Douglas Bumbarger.

To be admissible as a spontaneous declaration or an excited utterance, two requirements must be met: "[f]irst there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." Strong, J., *McCormick on Evidence* §272 at 216 (4th ed. 1992).

Petitioner concedes that the fact of being shot, or witnessing someone being shot, is a "startling event." Under the circumstances of this case, however, there is no showing that the statements of Douglas Bumbarger were in response to this startling event. Thus, their admission

---

[11] A "spontaneous declaration" is the equivalent of an "excited utterance" under Pennsylvania and federal law. *Commonwealth v. Hess*, 270 Pa. Super. Ct. 501, 411 A.2d 830 (1980); *Fed. R. Evid.* §803(2).

violated the hearsay rule and the Petitioner's right of confrontation.

Instructive on the issue of whether Mr. Bumbarger's statements were excited utterances is to compare the evidentiary foundation that served to establish that Ms. Dixon was still operating under the stress of being shot when she made her statements to Trooper Yuhouse with the paucity of evidence showing that Mr. Bumbarger was still so influenced.

The Superior Court of Pennsylvania pointed to evidence that Ms. Dixon was pale, frightened and upset at the time she made her statements to Trooper Yuhouse to establish that she was still laboring under the stress of being shot when interviewed by the Trooper. By contrast, there is no evidence on the record that Mr. Bumbarger was in a similar mental, emotional and physical state *at the time* Trooper Yuhouse took the damning statements from him concerning Petitioner's intent at the time of the shooting. Although there is a reference in the record to the effect that when Trooper Yuhouse arrived at the hospital to conduct his investigation he found both Ms. Dixon and Mr. Bumbarger to be "excited and upset," there is no evidence concerning Mr. Bumbarger's condition *at the time he was interviewed,* which was after the interview of his mother. Indeed, immediately after the shooting and while still inside the trailer, Mr. Bumbarger threatened to make Petitioner "pay" for what he had done which reflects an emotional state bent on vengeance rather than one laboring under fear. *R.* at 161(a); 170(a). Moreover, Mr. Bumbarger's purported non-reflexive statements to Trooper Yuhouse are belied by his wherewithal at assisting his mother drive to the hospital and

the fact that they were made in response to the Trooper's interrogation. *R.* at 170(a).

The instant case presents a classic example of the importance of cross-examination and why Petitioner's inability to cross-examine Mr. Bumbarger's hearsay statements constituted a denial of his right of confrontation and due process of law. Petitioner was unable to cross-examine Mr. Bumbarger concerning Bumbarger's ability to even hear Petitioner state "I'm going to kill you all." That such a statement was not even made was raised through cross-examination of Raymond Smeal, the nephew of Kathy Dixon and cousin of Mr. Bumbarger, who testified that he never heard Petitioner make any threatening statement even though he was in the same closed confines of the trailer as were Petitioner, Ms. Dixon and Mr. Bumbarger. *R.* at 165(a)-166(a). Cross-examination of Mr. Bumbarger would have provided context to Mr. Bumbarger's statement to Petitioner "you'll pay for this you son of a bitch." *R.* at 161(a); 170(a). Such a statement, plainly uttered in a spirit of vengeance, belies the notion that subsequent statements made by Mr. Bumbarger to Trooper Yuhouse over an hour later in response to questioning were the product of the startling event – the shooting.

In sum, Mr. Bumbarger's statements to Trooper Yuhouse were hearsay not within an exception. As such, their admission violated the Confrontation Clause. No evidence save for these hearsay statements, was presented concerning Petitioner's intent at the time he fired the gun. Cross-examination was essential to test the accuracy and motivation of Mr. Bumbarger's hearsay

statements. Consequently, the admission of these hearsay statements did not constitute harmless error.

CONCLUSION

For the foregoing reasons, Petitioner RICHARD L. BARNYAK prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the Superior Court of Pennsylvania affirming the judgment of sentence imposed on Petitioner.

Respectfully submitted,

OF COUNSEL:
MARK S. GREENBERG
3100 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
(215) 735-5900

ANNE M. DIXON
3100 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
(215) 735-5900
Attorney for Petitioner

COMMONWEALTH of Pennsylvania,

v.

Richard L. BARNYAK, Appellant.

Superior Court of Pennsylvania.

Argued June 23, 1993.
Filed Jan. 25, 1994.

Reargument or Reconsideration
Denied March 30, 1994.

John R. Carfley, Phillipsburg, for appellant.

J. Karen Arnold, Dist. Atty., Bellefonte, for Com., appellee.

Before ROWLEY, President Judge, and TAMILIA and POPOVICH, JJ.

ROWLEY, President Judge.

Richard L. Barnyak appeals from the judgment of sentence imposed following his conviction for aggravated assault, simple assault, recklessly endangering another person, and terroristic threats. Upon review of the variety of issues raised on appeal, we affirm the judgment of sentence.[1]

The charges against appellant arose from a domestic dispute in which Kathy Dixon, now Kathy Barnyak, appellant's wife, was shot in the hand. The incident occurred on April 21, 1990, at approximately 2:00 a.m. Ms. Dixon was admitted to the hospital for treatment at

---

[1] The memorandum decision filed on September 7, 1993, which reversed the judgment of sentence, was withdrawn by this panel pursuant to an order dated October 25, 1993.

2:35 a.m. and was initially interviewed there by a police officer at approximately 3:10 a.m. While present at the hospital, Ms. Dixon's son and nephew also made statements to the officer regarding the shooting incident. The out-of-court statements of Ms. Dixon, her son, and her nephew were introduced at trial as substantive evidence.

Ms. Dixon and her son were subpoenaed to appear in court at the time of trial and there reiterated, in the presence of the jury, a prior refusal to testify against appellant. Both were held in contempt and incarcerated by the trial judge until the conclusion of the Commonwealth's case. Appellant was convicted of the offenses named above and was acquitted on charges of attempted first and third degree murder. The trial court denied appellant's motions for a new trial and in arrest of judgment, his petition for reconsideration, and his motion to modify sentence. We consider, in order, the issues he has raised on appeal.

First, appellant argues that out-of-court statements made at the hospital by the victim and other witnesses were improperly admitted at trial under the excited utterance exception to the hearsay rule. The statements were introduced through the testimony of Trooper Paul Yuhouse who interviewed Ms. Dixon, her son, and her nephew at the hospital. Trooper Yuhouse did not have an independent recollection of the interviews, but testified with reference to field notes. Before considering the hearsay issue raised, we address appellant's allegation that Trooper Yuhouse could not "accurately attribute any of the statements [recorded in the field notes] to any one particular individual." Brief of Appellant at 15. We find this allegation without basis in the record.

Prior to relating the statements made to him at the hospital, Trooper Yuhouse was specifically asked by the Commonwealth's attorney i) "did Ms. Dixon make statements to you . . . and if so could you tell the jury what those statements were?" N.T. 3/11/91 at 43; ii) "Do you recall what statements Mr. Bumbarger [Ms. Dixon's son] made to you relative to what happened?" *Id.* at 44; and iii) "With respect to Raymond Smeal [Ms. Dixon's nephew], you indicated you had also spoken with him?. . . . What statements did he make relative to what had occurred that night?" *Id.* at 46. Our review reveals that Trooper Yuhouse testified with specificity as to what each individual told him. This was evident from the fact that each individual's rendition of the events was from the vantage point of that individual. Because we conclude that Trooper Yuhouse did attribute the statements recorded in his field notes to each particular individual, we can consider whether these statements were properly admitted as excited utterances with respect to each speaker.

Appellant generally cites the following factors, among others, as persuasive that none of the statements qualify as excited utterances: 1) the statements were not made sufficiently close in time to the startling event; 2) the site of the startling event was remote from the hospital where the statements were made. We also note that the statements were made in response to police questioning. Even so, these factors are not preclusive to a finding of an excited utterance. *See Commonwealth v. Von Smith,* 303 Pa.Super. 534, 450 A.2d 55 (1982) (although victim died, death of speaker not required for admission of excited utterance).

The following relevant circumstances support the conclusion that the statements made by Ms. Dixon and her son qualified as excited utterances. *See Commonwealth v. Hess*, 270 Pa.Super. 501, 411 A.2d 830 (1980) (spontaneous declaration made when experiencing overpowering emotion in response to an unexpected or shocking event). On April 21, 1990 at approximately 2:00 a.m., appellant and Ms. Dixon were drunk and arguing inside the trailer they shared. N.T. 3/11/93 at 96 (Test. of Trooper Robert Snook, investigating officer testifying to statements made to him by appellant), and N.T. 3/12/93 at 14 (Test. of appellant Richard Barnyak). Ms. Dixon's son, Douglas Bumbarger, and her nephew, Raymond Smeal, were present in the trailer throughout the heated and physical argument. N.T. 3/11/93 at 58-62 (Test. of Raymond Smeal).

Appellant and Ms. Dixon continued arguing, pulling one another's hair, and moved toward the master bedroom away from the area where the son and nephew were. N.T. 3/11/93 at 96 (Test. of Trooper Snook). Appellant entered the master bedroom but testified that he was unsure whether he or Ms. Dixon, who had not entered the room, closed the door behind him. N.T. 3/12/93 at 25 (Test. of Appellant). Ms. Dixon's son went back toward the bedroom, then ran back to the area where the nephew was. N.T. 3/11/93 at 61 (Test. of Raymond Smeal). Appellant picked up his gun from the dresser, pointed at the closed bedroom door and fired. N.T. 3/11/93 at 97 (Test. of Trooper Snook).

Four gunshots were fired through the door. *Id.* A fifth shot was fired directly above the doorknob and struck Ms. Dixon in the hand. *Id.* After appellant fired at the

doorknob, he heard Ms. Dixon scream "oh, my hand," N.T. 3/12/93 at 27 (Test. of Appellant), then fired one round through the bedroom wall after he heard her screaming. N.T. 3/11/93 at 97-98 (Test. of Trooper Snook). Appellant did not pause at any time between the shots, and he emptied the gun. N.T. 3/12/93 at 25 (Test. of Appellant). Once the shots were fired and the son and nephew heard Ms. Dixon scream, the son ran back down the hallway. N.T. 3/11/93 at 61-62 (Test. of Raymond Smeal). Ms. Dixon, her son and nephew then left the trailer and went to the car which the nephew had started. *Id.* at 62. Ms. Dixon was yelling "my hand," and her son was yelling at appellant from outside "you'll pay for this you son of a b___." *Id.*, N.T. 3/12/93 at 49 (Test. of Appellant).

Dr. Howard Bursh, the emergency room physician who treated Ms. Dixon shortly thereafter,[2] testified that she was pale and obviously frightened. N.T. 3/11/93 at 16. Her pulse was elevated; her blood pressure was markedly elevated; and her pupils were dilated. *Id.* Dr. Bursh administered an injection of an antianxiety agent because Ms. Dixon seemed to be "really panic stricken." *Id.* at 25. The emergency room nurse, Judy Pleskonko, further testified that Ms. Dixon was crying and saying she could not believe this had happened to her. *Id.* at 27-28. When Trooper Yuhouse arrived to interview Ms. Dixon, her son, and her nephew, he observed that all of them were excited and upset that Ms. Dixon had been shot. *Id.* at 42.

---

[2] As stated earlier, the incident occurred at approximately 2:00 a.m. and Ms. Dixon was admitted for medical treatment at 2:35 a.m.

Nurse Pleskonko testified that Ms. Dixon was still upset when she left treatment from the emergency room at 4:45 a.m.

Considering the involvement of Ms. Dixon and her son in the shooting incident, and considering the mother/son relationship between the two, we have no difficulty finding that their statements at the hospital were declarations made while experiencing overpowering emotion caused by a shocking event. Therefore, the trial court did not abuse its discretion by admitting them as excited utterances. With respect to the nephew, Raymond Smeal, who had less involvement with the incident and a more distant relationship with Ms. Dixon, there might be some question about whether his statements also qualified. Even so, Raymond Smeal did testify at appellant's trial, and the statements he made at the hospital to Trooper Yuhouse were covered by his own testimony. Consequently, even if the admission of Smeal's statements was error, it was harmless error because the content of the statements was testified to by Smeal as well as by other trial witnesses, i.e., Trooper Snook, appellant, the emergency room physician and nurse. *See Commonwealth v. Foy*, 531 Pa. 322, 612 A.2d 1349 (1992) (no grounds for a new trial when error of admission harmless).

In his second issue, appellant claims the trial court erred in its denial of the wife/victim's motion to quash a subpoena and motion for a protective order. In support of this issue, appellant argues that *Commonwealth v. Hatfield*, 406 Pa.Super. 139, 593 A.2d 1275 (1991), *aff'd*, 610 A.2d 466, 530 Pa. 590 (Pa. 1992), is "inconsistent" with the court's disposition of the motions in this case.

When a subpoena to testify has been challenged and no privilege to avoid testifying exists, whether "to force the unwilling spouse to give evidence" is a discretionary question for the trial court. *Id.* 406 Pa.Super. at 142, 593 A.2d at 1276. The disposition of the discretionary question in *Hatfield* is not inconsistent with the disposition of the discretionary question in this case. As required, the court in *Hatfield* based its decision to quash the wife's subpoena on the unique facts and circumstances of that case. It was not an abuse of discretion for the same court to later refuse to quash the subpoena in this case merely because the court quashed the subpoena in *Hatfield.*

Appellant contends that ex parte communications transmitted from the Commonwealth's attorney to the trial judge prior to trial "may have convinced the court to decide this case contrary to the decision in *Hatfield.*" Brief of Appellant at 21. We find no evidence in the record that the trial judge was influenced. Therefore, even if the ex parte communications were improper, in the absence of evidence of influence, there is no basis for the grant of a new trial.

Also, under this second issue, appellant argues that the court prejudicially required the wife/victim "to take the stand in open court in the presence of the jury and state her refusal to testify."[3] The Commonwealth states in

---

[3] Kathy Barnyak testified in the presence of the jury as follows:

Q. Mrs. Barnyak, do you know an individual named Richard Barnyak?

response to this argument that "this issue was never raised in post verdict motions and is accordingly waived." Upon examination of the record, we agree with the Commonwealth. Within appellant's post-trial motion for a new trial, he alleges that the trial judge "[f]ailed to permit the defendant and/or the alleged victim to assert a privilege not to testify under § 5913 and § 5914 of the Judicial Code."[4] This allegation of error does not encompass the issue of whether it was prejudicial to require the victim to take the stand and state her refusal to testify before the jury. Considering the additional fact that the trial court did not have the opportunity to address the issue, it is waived on appeal. *See* Pa.R.Crim.P. 1123(c)(3).

Appellant's third issue argues that his conviction on the charge of aggravated assault, 18 Pa.C.S.A. § 2702(a)(1), was inconsistent with his acquittal on the charges of attempted murder of the first, 18 Pa.C.S.A. § 2502(a), and third, 18 Pa.C.S.A. § 2502(c), degree. He claims these crimes have identical elements of intent, and therefore the acquittal on the attempted murder charges

---

A. I do not wish to testify against my husband.
Q. You're stating that you know –
A. I'm stating that I'm not saying nothing against him.

N.T. 3/11/91 at 178-79. The court then explained to Mrs. Barnyak that she did not have a legal privilege not to testify. Upon her persistent refusal, the court excused the jury and determined to incarcerate Mrs. Barnyak for contempt of court. *Id.* at 180-81.

[4] 42 Pa.C.S.A. § 5913 (1993), Spouses as witnesses against each other.

42 Pa.C.S.A. § 5914, Confidential communications between spouses.

also should have resulted in an acquittal on the charge of aggravated assault. First, attempted murder of the first degree requires a specific intent to kill, which a conviction for aggravated assault obviously does not require.

Next, it does appear that the portion of the verdict acquitting appellant of attempted third degree murder[5] and convicting him of aggravated assault might be inconsistent, particularly with respect to the elements of intent. The conviction in this case for aggravated assault, section 2702(a)(1), was based on the jury's finding that appellant attempted to cause serious bodily injury to his wife, i.e., that he specifically intended to cause her serious bodily injury. Comparatively, the court instructed the jury that conviction for third degree murder would require a finding of "malice." The court defined malice to include "an intent to inflict serious bodily harm." N.T. 3/12/91, at 143. In spite of the fact that the intent elements of the two charges overlap, we will not disturb the verdict on the basis of the apparent inconsistency in result where we find the evidence sufficient to support the guilty verdict. *See Commonwealth v. Boyles*, 407 Pa.Super. 343, 595 A.2d 1180 (1991), *allocatur denied*, 531 Pa. 651, 613 A.2d 556 (Pa.1992).

Fourth, appellant argues that certain evidence[6] was obtained as a result of an illegal search and seizure and

---

[5] Although appellant does not raise the issue, we must also note that there is no crime of attempted third degree murder. *See Commonwealth v. Spells*, 417 Pa.Super. 233, 237, 612 A.2d 458, 460 n. 5 (1992); *Commonwealth v. Griffin*, 310 Pa.Super. 39, 50, 456 A.2d 171, 177 (1983).

[6] "The evidence complained of consists of physical evidence, measurements, photographs and other evidence relating

therefore was improperly admitted at trial. The trial court held upon its examination of the record that appellant "did not file a Motion to Suppress or object at trial to the admission of this evidence," and therefore "such error, if any, is deemed to be waived." Opinion of Trial Court 9/14/92, at 4-5. A motion to suppress evidence must be made pretrial, unless "the opportunity did not previously exist, or the interests of justice otherwise require." Pa.R.Crim.P. 323(b); *Commonwealth v. Meischke*, 273 Pa.Super. 134, 416 A.2d 1126 (1979).

Appellant claims the following circumstances prevented him from being apprised of facts necessary to file a pretrial suppression motion: i) at the time the investigative team appeared at the crime scene, appellant was in custody and had no independent knowledge of the search and seizure event; ii) three other witnesses were likewise unaware of the circumstances giving rise to the event; iii) while appellant was aware that the search and seizure had occurred, he was not apprised in the pretrial proceedings of the exact sequence of events. Upon consideration of the record together with the parties' arguments, we find insufficient justification for the failure to file a timely objection to the legality of the search and seizure.

The fact that appellant was not personally aware of the facts surrounding the search and seizure does not mean the opportunity to file a motion to suppress did not

---

to the Interior of [appellant's and the victim's] trailer." Brief of Appellant at 31. Additional evidence complained of includes "the weapon allegedly used in this criminal incident" and "other items of evidence eventually introduced at trial." *Id.* at 32.

previously exist. Moreover, justice does not otherwise require us to address the question of the legality of the search and seizure where our review reveals that appellant's arguments[7] have no merit.

In his fifth issue, appellant argues that the Commonwealth failed to provide him with reasonable notice of its intention to seek a mandatory sentence under 42 Pa.C.S.A. § 9712(a). Appellant claims he was not provided with written notice of the Commonwealth's intent to proceed under section 9712(a) "until Friday, September 25, 1992, at approximately 3:30 o'clock P.M. when the District Attorney tele-faxed a letter to the office of defense counsel." Appellant further asserts that the "fax arrived after counsel had left the office for the weekend." Appellant was sentenced on Monday, September 28, 1992.

We cite the trial court's correct conclusion that sentencing under the statute was justified due to i) pre-trial discussions between the Commonwealth and defense counsel "regarding the Commonwealth's intent to seek the mandatory five-year sentence" and ii) the written notice provided prior to sentencing. Also, in response to appellant's argument that the Commonwealth failed to

---

[7] Appellant's suppression arguments are as follows:

1) following a consensual entry into the trailer, an investigating officer exited the trailer, waited several hours for an investigative team, then reentered the premises without additional consent or exigent circumstances;

2) with only the consent of appellant's brother, a police officer entered and searched the property of appellant's father.

Brief of Appellant at 31-32.

carry its burden of proof for application of the statute, we note that the "statute specifically provides that the court shall consider evidence from the trial, which in this instance would be sufficient to prove the use of a weapon." *Commonwealth v. Saksek*, 361 Pa.Super. 173, 522 A.2d 70 (1987)

Judgment of sentence affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 181 Middle District Allocatur Docket 1994
Respondent	:	
v.	:	Petition for Allowance of
RICHARD L. BARNYAK,	:	Appeal from Superior Court
Petitioner	:	

ORDER

PER CURIAM:

AND NOW, this 19th Day of December, 1994, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	NO. 671 HARRISBURG 1992
RICHARD L. BARNYAK, Appellant	:	

Appeal from the Judgment of Sentence Entered September 28, 1992, Docketed October 2, 1992, in the Court of Common Pleas, Criminal Division, of Centre County, No. 90-565.

BEFORE: ROWLEY, P.J., and TAMILIA and POPOVICH, JJ.

MEMORANDUM: FILED SEP. 7, 1993

Richard L. Barnyak appeals from the judgment of sentence imposed following his conviction for aggravated assault, simple assault, recklessly endangering another person, and terroristic threats. On appeal, he raises the following issues: 1) whether out-of-court statements made by the victim and other witnesses were improperly admitted at trial as excited utterances; 2) whether the trial court erred in its refusal of the victim's motion to quash a subpoena and motion for a protective order; 3) whether appellant's conviction on the charge of aggravated assault is inconsistent with his acquittal on the charge of attempted criminal homicide; 4) whether evidence was obtained as a result of an illegal search and seizure and therefore improperly admitted; and 5) whether the Commonwealth failed to provide appellant reasonable notice of its intention to seek a mandatory sentence. Upon review, we reverse due to the improper admission of hearsay statements.

The charges against appellant arose from an alleged domestic dispute in which Kathy Dixon, now Kathy Barnyak, appellant's wife, was shot in the hand. The incident occurred on April 21, 1990, at approximately 2:00 a.m. Ms. Dixon was admitted to the hospital for treatment at 2:35 a.m. and was initially interviewed there by a police officer at approximately 3:10 a.m. Ms. Dixon, as well as two other witnesses who were present at the hospital, made statements to the officer regarding the shooting incident.

Ms. Dixon and her son, one of the individuals who made statements at the hospital, were subpoenaed to appear in court at the time of trial in order to reiterate, in the presence of the jury, their prior refusal to testify against appellant. Both were held in contempt and incarcerated by the trial judge until the conclusion of the Commonwealth's case. Their out-of-court statements were then introduced as substantive evidence at trial through the testimony of a police officer.

Appellant's first complaint regarding the improper admission of the out-of-court statements is meritorious. Appellant argues that the statements are unsworn hearsay statements which do not qualify for admission as evidence under the excited utterance exception to the hearsay rule. We agree that the requirements for the admission of a statement as an excited utterance were not met.

An excited utterance is a spontaneous declaration made by a person who is experiencing overpowering emotion in response to an unexpected or shocking occurrence. *Commonwealth v. Hess*, 270 Pa.Super. 501, 507, 411

A.2d 830, 833 (1980) (citation omitted). The declaration must be made so near to the occurrence, both in time and place, as to exclude the possibility that it emanated from the speaker's reflective faculties. *Id.* "an excited utterance is the event speaking and not the speaker." *Commonwealth v. Zukauskas*, 501 Pa. 500, 503, 462 A.2d 236, 237 (1983).

Appellant is correct in his assertion that "the amount of time which elapsed between the incident [and the declaration,] and the remoteness of the location of the incident from the interview site" belie the spontaneity necessary to find an excited utterance. The record does not support the conclusion that the "event" was "speaking" approximately one hour after the shooting incident, in response to the questions of a police officer, at a hospital which was safe and removed from the location of the shocking event.

Because appellant was prejudiced by the improper admission of this hearsay evidence, he is entitled to a new trial. As a result of our conclusion that a new trial is necessary, we will not consider the issues which remain.

The judgment of sentence is reversed, and the case is remanded for a new trial.

D-1

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY,
PENNSYLVANIA

CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA	)	
vs.	)	NO. 1990-565
RICHARD L. BARNYAK	)	

ORDER

AND NOW, March 11, 1991, upon consideration of Defendant Richard L. Barnyak's October 1, 1990, Motion In Limine whereby Defendant seeks to (1) exclude the preliminary hearing testimony of Kathy Dixon-Barnyak and Douglas Bumbarger, and (2) exclude statements made to Trooper Paul Uhous [sic] by Kathy Dixon-Barnyak and Douglas Bumbarger, said motion is DENIED.

Preliminary hearing testimony of Ms. Dixon-Barnyak and Douglas Bumbarger shall not be excluded from the trial in this matter based on this motion. Statements made at the hospital to Trooper Paul Uhouse [sic] by Ms. Dixon-Barnyak and Douglas Bumbarger may be introduced at trial.

BY THE COURT:

/s/ Charles Brown
P.J.

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY,
PENNSYLVANIA

CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA	)	NO. 1990-565
vs.	)	
RICHARD L. BARNYAK	)	

OPINION AND ORDER

BROWN, JR., P.J.

Presently before this Court for consideration is a Motion for a New Trial and Arrest of Judgment and a Supplemental Motion for New Trial and In Arrest of Judgment filed by Defendant Richard L. Barnyak.

Defendant was tried by a jury on March 20 and 21, 1991, and found guilty on two courts of Aggravated Assault, two counts of Simple Assault, one count of Recklessly Endangering Another Person and one count of Terroristic Threats. Defendant was acquitted on the charges of Attempted First Degree Murder and Attempted Third Degree Murder.

Defendant has raised three issues which he claims were error. Defendant initially argues the trial court erred in charging the jury on the elements of criminal attempt and in failing to grant Defendant's motion to dismiss those charges. Defendant contends that this charge was a legal impossibility pursuant to *Commonwealth v. Griffith*, 310 Pa.Super. 39, 456 A.2d 171 (1983). In *Griffith*, the Superior Court stated:

> The question squarely presented to us is whether someone can attempt to commit murder of the second or third degree. We think not. A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime. 18 Pa.C.S.A. Section 901. Murder of the second or third degree occurs where the killing of the victim is the unintentional result of a criminal act. Thus, an attempt to commit second or third degree murder would seem to require proof that a defendant intended to perpetrate an unintentional killing – which is logically impossible. While a person who only intends to commit a felony may be guilty of second degree murder if a killing results, and a person who only intends to inflict bodily harm may be guilty of third degree murder if a killing results; it does not follow that those persons would be guilty of attempted murder if a killing did not occur. They would not be guilty of attempted murder because they did not intend to commit murder – they only intended to commit a felony or to commit bodily harm.

Griffith, 456 A.2d at 177 (1983).

The *Griffith* Court went on to note that:

> . . . [A] Subcommittee Note to the *Pennsylvania Suggested Standard Criminal Jury Instructions* suggests that an intent to kill is necessary to support a charge of attempted murder. The Subcommittee Note following the suggested jury instruction on the crime of criminal attempt states that in defining the crime which was attempted, the court should limit its definition to those aspects of the crime which are relevant to an attempt. 'For example, if the charge were

> attempted murder, a definition of murder limited to murder by intentional killing should suffice.' *Pennsylvania Suggested Standard Jury Instructions (Criminal),* 12.901 A – Criminal Attempt (1979).

Griffith, 456 A.2d at 177-78 (1983).

The Superior Court then held that in order to convict a person of attempted murder, an intent to kill must be shown, and that a defendant charged with attempted murder is entitled to a jury instruction to that effect. *Griffith,* 456 A.2d at 178 (1983).

In *Commonwealth v. Greene,* Pa.Super. Court No. 00260, Harrisburg, 1991 (July 22, 1992), the Superior Court rejected the contention that third degree murder is an unintentional crime. *Greene* held that the intent, although not specific, is supplied by the malice. The *Greene* Court noted the Subcommittee Note in the December, 1988, revision to the Pennsylvania Suggested Standard Criminal Jury Instructions, wherein it is stated:

> Some Pennsylvania decisions appear to equate the "intent to kill" in the definition of malice with the "specific intent to kill" required for first degree murder, see, e.g., *Commonwealth v. Pitts,* 486 Pa. 212, 404 A.2d 1305 (1979). This is undesirable because there are cases where a defendant as a factual matter has an intent, i.e., a purpose to kill sufficient for malice that does not amount to a specific intent to kill. Examples where such an intent may exist to permit conviction of third degree murder included a defendant who kills in sudden passion on inadequate provocation. . . . In such cases a defendant's purposeful killing may be intentional for malice

> purposes but his intent may not be sufficiently formed or within his consciousness as to meet the legal standard for specific intent. The problem about which we are talking is partly one of semantics.

Based on the foregoing analysis of the requirements of third-degree murder, and the evidence presented, this Court finds that Defendant's actions, had they resulted in the death of Kathy Barnyak, would have satisfied the requirements necessary to sustain a finding of guilt for third degree murder. Because this Court does not believe that defendant's actions were unintentional, a charge of attempted third degree murder was neither illogical nor illegal.

Defendant also argues that Court erred in refusing to quash the subpoena to compel the testimony of Kathy Barnyak, Defendant's spouse. Defendant contends that this was inconsistent with the decision in *Commonwealth v. Hatfield,* 406 Pa.Super. 139, 593 A.2d 1275 (1991). In *Hatfield,* the Superior Court upheld this Court's decision not to compel the wife to testify against her husband. The Court made it clear however that in domestic violence cases the spouse may be *compelled* to testify. *Hatfield,* 593 A.2d at 1276 (1991), citing *Commonwealth v. Hancharik,* 388 Pa.Super. 337, 345, 565 A.2d 782, 786 (1989). (Emphasis in original case.)

It is well settled in Pennsylvania that a spousal privilege does not exist in a criminal proceeding against a spouse for bodily injury or violence attempted, done or threatened upon the other spouse. 42 Pa.C.S.A. Section 5913. See also, *Commonwealth v. Galloway,* 271 Pa.Super. 305, 413 A.2d 418 (1979). Therefore, it is the opinion of

this Court that there was no error in the refusal to quash the subpoena for Kathy Barnyak.

Finally, Defendant argues that the evidence seized by the investigating officers resulted from an illegal search and seizure. An examination of the record in this case indicates Defendant did not file a Motion to Suppress or object at trial to the admission of this evidence. (See Trial T. I., pp. 85 and 123-28.) Therefore, such error, if any, is deemed to be waived by Defendant. See, Pa.R.Crim.P. 323(b); see also, *Commonwealth v. Minarich*, 345 Pa.Super. 269, 498 A.2d 395 (1985).

Accordingly, the Court enters the following:

ORDER

AND NOW, this 14th day of September, 1992, upon full consideration of the record and arguments of counsel, Defendant Richard L. Barnyak's Motion for New Trial and Arrest of Judgment and Supplemental Motion for New Trial and In Arrest of Judgment are DENIED.

BY THE COURT:

/s/ Charles Brown
P.J.